

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**DONALD VANDERWOUDE**  
Claimant

VS.

**DONALD VANDERWOUDE d/b/a**  
**AMERICAN MOBILE HOME SERVICE**  
Respondent

**TRAVELERS PROPERTY CASUALTY**  
Insurance Carrier

Docket No. 244,213

**ORDER**

Respondent appeals Administrative Law Judge Brad E. Avery's October 31, 2000, Award. The Appeals Board heard oral argument on April 18, 2001.

**APPEARANCES**

Michael R. Wallace of Shawnee Mission, Kansas, appeared on behalf of the claimant. Gregory D. Worth of Lenexa, Kansas, appeared on behalf of respondent and its insurance carrier.

**RECORD & STIPULATIONS**

The Appeals Board has considered the record and has adopted the stipulations listed in the Award. In addition, the parties agreed that the Administrative Law Judge inadvertently failed to list the August 8, 2000, deposition of Anthony F. Porto, Jr., M.D., as part of the record. Also, the Administrative Law Judge found claimant's pre-injury average weekly wage was \$1,442.31. But the parties had stipulated to a pre-injury average weekly wage of \$1,219.26.

### ISSUES

The Administrative Law Judge (ALJ) found that on claimant's date of accident, April 1, 1999, he was covered by a workers compensation insurance policy issued by Travelers Property Casualty Insurance Company, (Travelers). As a result of that insurance coverage, the ALJ found claimant was an employee covered by the Kansas Workers Compensation Act (KWCA). The ALJ further found claimant proved that as the result of the severe and disabling injuries he received in the April 1, 1999, work-related accident, he suffered a 90% work disability and awarded claimant the maximum permanent partial general disability benefit of \$100,000.<sup>1</sup>

But respondent appeals and contends that claimant, as a self-employed person, was not covered by the KWCA on April 1, 1999, the date of his work-related accident, because he chose to exclude himself from coverage under the workers compensation insurance policy he applied for in December 1994. Because claimant specifically excluded himself from workers compensation insurance coverage, the insurance carrier, Travelers, did not, as required by the KWCA, cause to be filed with the Director of Workers Compensation an election for claimant, a self-employed person, to be treated as an employee for the purpose of coverage under the KWCA.<sup>2</sup>

Claimant, on the other hand, contends he proved he relied on certificates of insurance issued by the local insurance agent that he was included and not excluded from coverage under Travelers' workers compensation insurance policy. Claimant further argues that as a result of the severe disabling injuries he suffered from the April 1, 1999, fall at work, he is permanently and totally disabled from engaging in any substantial gainful employment.<sup>3</sup> Thus, claimant contends he is entitled to permanent total disability benefits not to exceed the statutory maximum of \$125,000.<sup>4</sup>

### FINDINGS OF FACT & CONCLUSIONS OF LAW

After reviewing the record, considering the briefs, and the parties' arguments, the Appeals Board (Board) finds the ALJ's Award should be reversed and claimant is denied

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<sup>1</sup>See K.S.A. 44-510f(a)(3) (Furse 1993).

<sup>2</sup>See K.S.A. 44-542a (Furse 1993).

<sup>3</sup>See K.S.A. 44-510c(a)(2) (Furse 1993).

<sup>4</sup>See K.S.A. 44-510f(a)(1) (Furse 1993).

compensation benefits because he was not covered by the provisions of the KWCA on April 1, 1999, the date of his work-related accident.

#### FINDINGS OF FACT

1. On April 1, 1999, claimant was self-employed, d/b/a American Mobile Home Service.

2. Claimant was in the business of contracting with various companies and individuals to transport prefabricated homes and commercial buildings to building sites. Claimant then performed various job duties necessary to set up and permanently install the prefabricated homes and buildings on the building sites.

3. In late 1994, various companies claimant was contracting with to transport and set up these prefabricated homes and buildings required claimant to have evidence of workers compensation insurance coverage.

4. Claimant contacted a local insurance agency in December 1994, to obtain workers compensation insurance coverage in order to continue to do business with these various companies.

5. On December 30, 1994, claimant met with Amy Murphy, the commercial line account manager for the local insurance agency, and claimant applied for workers compensation insurance coverage.

6. Ms. Murphy completed an ACORD 130 form, Workers Compensation Application, and an ACORD 133 form, Workers Compensation Insurance Plan, Assigned Risk Section. Because claimant was a small contractor with no payroll, no insurance company would insure claimant on a voluntary basis. Therefore, Ms. Murphy had claimant make an application for coverage through the assigned risk pool administered by the National Council on Compensation Insurance (NCCI).

7. Ms. Murphy filled the application out in the presence of the claimant. Although claimant was the only full-time employee of American Mobile Home Service, he did at various times during the year hire "contract labor" to assist him in setting up some of the larger commercial buildings.

8. Claimant expressed his desire to Ms. Murphy to obtain workers compensation coverage for the least amount of cost and still meet the contractors requirement of showing evidence of workers compensation insurance coverage.

9. The application for workers compensation insurance that claimant signed included a section that indicated claimant was the 100 percent owner of the company and

he should be excluded from coverage.

10. The first year's annual premium was shown as an estimate based on \$12,600 of payroll that did not include the \$23,500 payroll listed as claimant's remuneration in the section indicating that claimant was excluded from coverage.

11. Claimant signed both the ACORD 130 and 133 forms. Claimant did not recall all of the details of the meeting with Ms. Murphy and applying for the workers compensation insurance coverage. But he did think he read the application before he signed it.

12. Claimant's application was then sent to NCCI's plan administrator who assigned the application to Aetna Life and Casualty Insurance Company (Aetna) which was later merged in May 1996, with Travelers.

13. Aetna issued claimant a policy for the policy year from January 1, 1995, to January 1, 1996, for a total estimated premium of \$750.

14. The local insurance agency issued a Certificate of Insurance on ACORD 25-S (7/90) form indicating claimant as the insured, showing claimant had workers compensation insurance coverage for the period from January 1, 1995, to January 1, 1996, and the certificate holder as GE Capitol Modular Space. The Certificate of Insurance was signed by Amy Murphy as authorized representative. The certificate did not indicate whether claimant as the proprietor, partner or executive officer was included or excluded from insurance coverage.

15. The Certificate of Insurance, however, contained the following language:

This certificate is issued as a matter of information only and confers no rights upon the certificate holder. This certificate does not amend, extend or alter the coverage afforded by the policies below.

16. Other certificates of insurance were admitted into the record that were issued after the first certificate and were issued on a different revision of the ACORD 25-S form. Those forms all indicated that the proprietor, partner, or executive officers were included in the workers compensation coverage.

17. Copies of the insurance policies issued to claimant were also admitted into the record. Those policies were sent to the local insurance agency and then sent to the claimant. The policies covered the yearly periods from January 1, 1995, through January 1, 2000. The policies did not specify whether claimant as the proprietor was excluded or included from coverage except for the policy covering the period from January 1, 1997, to

January 1, 1998. That policy contained an endorsement page that excluded claimant as owner from workers compensation coverage.

18. Claimant testified that he relied on the certificates of insurance that were issued and thought he was covered by workers compensation insurance if he was injured at work. But claimant also answered "No" when he was asked if he requested the certificate of insurance for the purpose of verifying in his own mind that he had workers compensation coverage for himself.

19. The certificate of insurance's only purpose is to notify the contractor, as the certificate holder, that the policies of insurance listed in the certificate have been issued to the insured as designated in the certificate for the policy period indicated. The certificates of insurance that were issued by the local insurance agency with the indication that claimant was included in the coverage were issued by mistake.

20. The insurance carrier, Travelers, also received a copy of the certificates that were issued by the local insurance agency. But the only purpose Travelers used the certificates for was to enter them into their system so it could notify the certificate holder if the policy was canceled during the period of coverage noted on the certificate.

21. Although one policy for the period from January 1, 1997, to January 1, 1998, included an exclusion endorsement, subsequent policies did not include such an endorsement. The reason for not including the exclusion endorsement was that the insurance carrier, Travelers, made a policy decision that since the KWCA is very specific that a sole proprietor or self-employed person is not covered by the Act unless an election is filed with the Director by the insurance carrier, then there was no need for an exclusion endorsement. Instead, workers compensation policies issued after January 1, 1998, only contained an inclusion endorsement if the self-employed person elected to be included in the workers compensation coverage. The insurance carrier would then have the self-employed person sign the election form and the insurance carrier, as required by statute, would file the form with the Director of Workers Compensation. Travelers had a policy that when the self-employed person elected to be covered under the policy it would not issue the policy with the inclusion endorsement until the election form was filed.

22. The premiums for the workers compensation coverage are based on a code determined by the type of work the insured company performs and the estimated amount of the company's payroll for the employees covered during the policy period.

The premium is the annual estimate based on an audit of the actual payroll paid during the period of the policy. Depending on the amount of payroll actually paid, then the premium for the next year is either adjusted up or down.

23. Claimant paid for the first year of coverage from January 1, 1995, through

January 1, 1996, an estimated premium of \$750. And for the subsequent renewals of the workers compensation policy, claimant paid premiums of \$849, \$766, \$792, and \$800. Travelers request for premium audits to claimant for the policy period of January 1, 1998, to January 1, 1999, and January 1, 1999, to January 1, 2000, showed claimant reported only gross wages paid to contract laborers and did not report his own earnings. Claimant testified that on the date of his accident he was earning somewhere between \$75,000 and \$80,000 per year. The parties stipulated to a pre-injury average weekly wage of \$1,229.26 per week or \$63,921.52 per year.

24. The record contains no evidence that after claimant signed the Application for Workers Compensation Insurance on December 30, 1994, that he notified either the local insurance agency or Travelers that he wanted to be included in coverage of the workers compensation insurance policy.

### CONCLUSIONS OF LAW

1. The Workers Compensation Act applies to an employee who suffers a personal injury by accident that arises out of and in the course of his employment.<sup>5</sup>

2. But an “employee” or “worker” shall not include individual employers, limited or general partners or self-employed persons, unless there is a valid election in effect which has been filed as provided by K.S.A. 44-542a and amendments thereto.<sup>6</sup>

3. K.S.A 44-542a (Furse 1993) provides as follows:

Each individual employer, partner or self-employed person may elect to bring himself or herself within the provisions of the workman’s compensation act, by securing and keeping insured such liability in accordance with clause (1) of subsection (b) of K.S.A. 44-532. Such insurance coverage shall clearly indicate the intention of the parties to provide coverage for such employer, partner, or self-employed person. When such election is made, the insurance carrier or its agent shall cause to be filed with the director a written statement of election accept thereunder so that such employer, partner, or self-employed person is treated as an employee for the purposes of the workman’s compensation act pursuant to such election. This election shall be effective until such time as such employer, partner, or self-employed person ceases to be insured in accordance with clause (1) of subsection (b) of K.S.A. 44-532, whereupon a written statement withdrawing such elections

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<sup>5</sup>See K.S.A. 1998 Supp. 44-501(a).

<sup>6</sup>See K.S.A. 1998 Supp.44-508(b).

shall be filed with the Director.

4. The Board concludes that the preponderance of the credible evidence contained in the record establishes that claimant was excluded from coverage of the workers compensation policy he purchased commencing for the policy period of January 1, 1995, and continuing with renewals of that policy through January 1, 2000. Therefore, on April 1, 1999, the date of claimant's work-related accident he was not subject to the provisions of the KWCA.

This conclusion is supported first by the fact that claimant read and signed an Application for Workers Compensation Insurance coverage on December 30, 1994, that specifically excluded claimant from coverage. Second, the certificates of insurance issued by the local insurance agency purpose is not for claimant to rely on for his coverage but are issued only for the purpose for the contractors to have proof that the subcontractor has workers compensation coverage to protect the contractors from workers compensation liability for the subcontractor's employees' work injuries. The contractor is not concerned whether claimant, as a self-employed person, is covered. Because the contractor does not have any liability for the self-employed subcontractor's work injuries, but does have liability for subcontractor's employees' work injuries.<sup>7</sup>

Third, there is absolutely no evidence in the record that claimant ever notified the local insurance carrier that he desired to be included in the coverage after he initially read and signed the Application for Workers Compensation Insurance, on December 30, 1994, which excluded him from coverage.

Fourth, as evidenced by the amount of yearly premiums claimant paid each year at the time claimant renewed the policy and the two payroll audits included in the evidence, claimant never reported his own earnings on the payroll audit for purposes of computing the policies annual premium for the covered employees. Thus, claimant never paid a premium computed to cover his potential work-related injuries.

Fifth, the workers compensation insurance policy claimant received for each period of coverage, did not include an endorsement that claimant was included as a covered employee. If claimant had notified the insurance carrier that he desired to be included in the coverage then the insurance carrier would have placed an endorsement in the policy that showed the claimant was included. Additionally, before the endorsement would have been included in the policy the insurance carrier would have filed an election with the Director of Workers Compensation.

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<sup>7</sup>See K.S.A. 1998 Supp. 44-503.

5. Claimant's attorney objected to the admission of respondent's exhibits numbered one through three offered by respondent in the July 7, 2000, deposition of Rita Sullivan Goddard, Travelers' team coordinator for underwriting NCCI business, on the basis the exhibits were hearsay evidence. Exhibit one consisted of the underwriting file for claimant's American Mobile Home Service from the date of claimant's December 30, 1994, application through March 24, 2000. Exhibit two is a copy of a notice dated January 2, 1999, sent to claimant from Travelers Premium Audit Department requesting payroll information for the policy period from January 1, 1998, to January 1, 1999. Exhibit three is a letter to the insurance agency from Travelers with attached payroll information completed by claimant for the policy year of January 1, 1999, to January 1, 2000. The letter indicated that claimant did not meet the audit provisions of the workers compensation policy and as a result the policy was being placed in cancellation status effective April 7, 2000.

The rules of evidence contained in K.S.A. 60-401 et seq., generally are not applicable to a workers compensation proceeding. The admissibility of evidence in a workers compensation proceeding is more liberal than in a civil case.<sup>8</sup>

Here, the Board concludes claimant's exhibit one is admissible as an exception to the hearsay rule because it is a business record identified by and under the custody and control of Ms. Goddard as an employee of Travelers. Exhibit two and three were copied from the audit department file not under Ms. Goddard's custody and control. But the Board concludes Ms. Goddard identified those exhibits as company records and the payroll records that were purportedly signed by the claimant. Thus, since claimant is a party in this proceeding and is subject to examination as to whether he did or did not sign those exhibits, the Board concludes that claimant's objection is overruled and exhibits two and three are likewise admitted into the record.

### **AWARD**

**WHEREFORE**, it is the finding, decision and order of the Board that Administrative Law Judge Brad E. Avery's October 31, 2000, Award, should be reversed and the claimant, Donald Vanderwoude is denied an Award against respondent, American Mobile Home Service and its insurance carrier, Travelers Property Casualty Insurance Company, for an accidental injury which occurred on April 1, 1999.

### **IT IS SO ORDERED**

Dated this \_\_\_\_ of October, 2001.

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<sup>8</sup>See Box v. Cessna Aircraft Co., 236 Kan. 237, 243-244, 689 P.2d 871 (1984).

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BOARD MEMBER

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BOARD MEMBER

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c: Michael R. Wallace, Attorney for the Claimant  
Gregory D. Worth, Attorney for Respondent and Insurance Carrier  
Brad E. Avery, Administrative Law Judge  
Philip S. Harness, Director of Workers Compensation